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409689—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 194

GEORGE FREDERICK GUNDELFINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court. The judgment of the District Court (R. 140–141) was affirmed by the Circuit Court of Appeals per curiam without opinion (R. 150).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 21, 1941 (R. 150). The petition for a writ of certiorari was filed June 20, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether certain printed and typed matter deposited by petitioner in the United States mails was "obscene, lewd, or lascivious" or "filthy" within the meaning of Section 211 of the Criminal Code.

2. Whether the trial court erred to petitioner's prejudice in instructing the jury.

3. Whether the trial court erred in refusing to grant petitioner's motion to withdraw a juror because of allegedly improper remarks by Government counsel in closing to the jury.

STATUTE INVOLVED

Section 211 of the Criminal Code, as amended (18 U. S. C. sec. 334), so far as pertinent, provides:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more

than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Petitioner was convicted, by verdict of a jury, upon 17 counts (R. 139–140) of an indictment in 22 counts (R. 2–7) returned in the Western District of Pennsylvania charging, in the odd numbered counts, that certain matter mailed by petitioner was obscene, lewd and lascivious and, in the even numbered counts, that the same matter was filthy, in violation of Section 211 of the Criminal Code.

Three documents are involved. Exhibit 1 (R. 39–130), the subject of counts 1 to 6, inclusive, 9, 10, 13, and 14, is a booklet which was mailed to three members of the faculty of Yale University and to two Government attorneys in this city (R. 151–152). Exhibit 6 (R. 131–134), covered by count 16 (charging that it was "filthy"), is a pamphlet in which was reprinted two articles from the Yale News and contains comments on these articles by the petitioner. This pamphlet was mailed to a Government attorney in this city (R. 151–152). Exhibit 7 (R. 135–137), the subject of counts 17 to 22, inclusive, is a letter mailed to three members of the Yale football squad (R. 152).

On November 1, 1940, the trial court, after overruling motions in arrest of judgment and for a new trial (R. 137–138), ordered that sentence be suspended and petitioner placed on probation for five

years (R. 1). In January 1941 a bench warrant was issued, a hearing was held, probation was revoked (R. 2), and petitioner was, by a general sentence, committed for a year and a day to the custody of the Attorney General for imprisonment in a penitentiary or in an institution for the treatment of mental cases (R. 141).[1] Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of conviction was affirmed *per curiam* without opinion (R. 150).

The evidence shows that petitioner was a graduate of and at one time an instructor at Yale University (R. 9, 15, 16). As a result of his association with and observation of students, he professes to have become imbued with an honest desire to "lessen immorality" among them (R. 10). He became convinced that the practice of manual manipulation of the male genital organ, stopping short of ejaculation and therefore not amounting to masturbation (R. 12, 13, 47), would reduce immorality, debauchery, and prostitution by serving as a clean and healthy substitute for them (R. 10–11, 50, 59), and would, moreover, benefit the individual's phys-

[1] We are not clear that petitioner's mental condition was or is sound, although the defense of insanity has not been advanced. But the alternative commitment, permitting detention in an institution for the treatment of mental cases, seems to remove much of the difficulty. We have been informed by the Bureau of Prisons of this Department that, under the circumstances, the petitioner will not be committed to an institution of the penitentiary type until after examination by competent psychiatrists.

ical and mental welfare (R. 10, 12, 47, 50, 54, 69, 135–137).

Petitioner has for 20 years (R. 47–48) printed and distributed, apparently entirely through the United States mails (R. 48), and at a considerable financial loss (R. 11, 48), thousands of pamphlets, booklets, and other of his writings called "New Fraternity Publications" (R. 130), especially to students and professors of Yale University (R. 10, 47).

Petitioner admits authorship and mailing of each of the exhibits (R. 26; Pet. 2–3), but denies that the matter mailed was "obscene, lewd, or lascivious" or "filthy" within the meaning of Section 211 (Pet. 9–16).

ARGUMENT

I

We do not believe that it can be doubted that the matter mailed by petitioner is "obscene, lewd, or lascivious" or "filthy" as those words of Section 211 have been judicially construed. *Swearingen* v. *United States,* 161 U. S. 446, 451; *Dunlop* v. *United States,* 165 U. S. 486, 500–501; *United States* v. *Limehouse,* 285 U. S. 424, 426; *Tyomies Pub. Co.* v. *United States,* 211 Fed. 385, 390 (C. C. A. 6).[2] See, e. g., as to Exhibit 1 R. 46–50, 53, 54, 58–62, 68–71;

[2] If Exhibits 1 and 7 come within either category or if Exhibit 6 is "filthy," that is sufficient since a general sentence was imposed which may be sustained by any count of the indictment under which petitioner was convicted.

as to Exhibit 6 R. 133; as to Exhibit 7 R. 136–137. There is no claim that this matter possessed literary or scientific value which might justify passages otherwise offensive (*United States* v. *One Book Entitled Ulysses,* 72 F. (2d) 705 (C. C. A. 2)), and obviously it cannot be said to rise to the dignity of sex instruction. *United States* v. *Dennett,* 39 F. (2d) 564 (C. C. A. 2). That petitioner, may, in his own opinion, have written "in the interest of social reform or moral betterment" is immaterial. *Rosen* v. *United States,* 161 U. S. 29, pp. 41–42; *Knowles* v. *United States,* 170 Fed. 409 (C. C. A. 8); *United States* v. *Slenker,* 32 Fed. 691 (W. D. Va.); *United States* v. *Harman,* 45 Fed. 414 (D. Kan.), reversed on other grounds, 50 Fed. 921 (C. C. D. Kan.).

The trial judge, we submit, could not have held, as a matter of law, that the writings involved were not within the purview of Section 211 and he appropriately left the determination of the question to the jury under comprehensive instructions (R. 144). See *Rosen* v. *United States, supra,* at p. 43; *United States* v. *Levine,* 83 F. (2d) 156, 157 (C. C. A. 2).

II

Petitioner contends (Pet. 16) that the trial court erred in permitting the jury to decide from its own knowledge whether the practices advocated by the petitioner would have an injurious effect upon one who practiced it. (See R. 29, cf. R. 12–13, 36.)

As both the trial court and the prosecuting attorney observed, the effect of following the practice advocated by petitioner was a wholly immaterial issue (R. 29), but petitioner injected this issue by requesting a charge that there was no evidence on the subject. The court's gratuitous observation that, in the absence of evidence, the jury could decide the question was clearly not prejudicial, since the court had previously instructed in its principal charge as to the essential elements of the offenses (R. 22–28). Moreover, petitioner did not object to the court's statement or the observations of the prosecuting attorney and must be presumed to have acquiesced therein.

III

Petitioner characterizes as improper and prejudicial certain statements in the closing argument of the prosecuting attorney (Pet. 18–19). While some of the remarks were intemperate or unnecessary, there is no basis for any claim of prejudicial error since the court promptly and in detail appropriately instructed the jury as to those which were called to its attention (R. 18–21). In view of the conclusive character of the evidence, counsel's argument cannot be said to have deprived petitioner of a fair trial. *Berger* v. *United States,* 295 U. S. 78, 84–89; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239; *United States* v. *Buckner,* 108 F. (2d) 921, 928 (C. C. A. 2), certiorari denied, 309 U. S. 669.

CONCLUSION

There is involved no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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